

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE POLLUTION CONTROL AGENCY

In the Matter of the Administrative Penalty
Order (APO) Issued to Daniel Tapio

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge (ALJ) Richard C. Luis on June 22 and 23, 2004 at the Offices of the Minnesota Pollution Control Agency, 520 Lafayette Road, St. Paul. The hearing record in this matter closed at the conclusion of the hearing on June 23, 2004 (conducted by telephone on that day).

Stephanie Morgan, Assistant Attorney General, 900 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101-2127 appeared on behalf of the Staff of the Minnesota Pollution Control Agency ("Agency", "MPCA"). Daniel Tapio, 6670 Ebersole Avenue Southeast, Delano, MN 55328, appeared on his own behalf.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Pollution Control Agency will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. § 116.072, subd. 6(e), the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least five days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Sheryl Corrigan, Commissioner, Minnesota Pollution Control Agency, 520 Lafayette Road, St. Paul, Minnesota 55155, to ascertain the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

STATEMENT OF ISSUES

Should the Administrative Penalty Order issued to Daniel Tapio for alleged violation of Minn. Rules 7020.2125, subpart 2(A), and 7060.0600, subp. 2, and failure to comply with five permit conditions be affirmed? If so, was the penalty in the APO calculated properly?

Based upon all the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Daniel Tapio operates a feedlot in Wright County, Minnesota. The feedlot lies along Ebersole Avenue Southeast in Delano, approximately one-third of a mile north of the intersection with Highway 16.^[1]

2. The Tapio feedlot contains bison that eat, drink and produce animal waste. The feedlot has been in operation continuously since 1989.^[2] The feedlot measures approximately 200 feet from north to south. The east-west width is approximately 260 feet. The southwest corner of the feedlot area is occupied by a barn.^[3] The area occupied by the barn is outside of the feedlot fence. Approximately 800 feet southeast of the feedlot is the south fork of the Crow River.^[4] North of the feedlot, approximately 75 feet away, is a wetland in a wooded area. The slope of the terrain in the feedlot directs runoff towards the southwest corner. Drainage from the area is provided also by a ditch along Ebersole Avenue, carrying water toward the Crow River. There is no mechanism intercepting or treating drainage running through the ditch to the Crow River.

3. On September 1, 1999, James Verros (a staffer for the MPCA), responded to a complaint regarding the condition of the Tapio feedlot. Verros conducted an inspection and noted that bison manure and bedding had accumulated to a depth of approximately four feet around the edges of the feedlot.^[5] The last time that manure had been removed from the feedlot was in 1998. Two low points in the feedlot contained manure-contaminated water. Verros noted that runoff into the Ebersole Avenue ditch discharges into the Crow River.^[6] Verros suggested that Tapio complete a feedlot permit application and suggested that the soil and water conservation district ("SWCD") be contacted for assistance.^[7]

4. On February 9, 2000, Verros wrote to Tapio, indicating that no feedlot permit application from Tapio had been received by the MPCA.^[8] Verros indicated that Tapio should include a soils map of the facility; aerial photographs of the facility and tillable acreage to be used for spreading the manure; a site sketch detailing surface water flows, buildings, wells, and lots; and a manure management plan. Verros again suggested that Tapio seek the assistance of the Wright County SWCD in preparing the permit application.^[9]

5. On May 24, 2002, Verros visited the Tapio facility. Because no one was present at the facility, the inspection was limited to what could be observed from Ebersole Avenue. Verros took photographs of the feedlot.^[10] Conditions at the feedlot were substantially the same as on the earlier visit. No apparent effort had been made to remove the manure present in the feedlot.

6. On September 20, 2002, Verros sent Tapio a letter (known as a "15-Day Letter") advising him that his feedlot allegedly violates the rules applicable to manure stockpiling, untreated manure-contaminated runoff, and prohibited discharge of pollutants.^[11] The 15-Day Letter noted that inspections were conducted on September 1, 1999, May 24, 2002, and July 12, 2002. The 15-Day Letter also noted that a Notice

of Violation had been issued on April 24, 2002.^[12] The letter urged Tapio to contact the MPCA staff to discuss the violations. Tapio did not respond to the 15-Day Letter.

7. A second 15-Day Letter was hand-delivered to Tapio on October 18, 2002.^[13] He telephoned Verros on November 4. At that time, Tapio indicated that he would address the alleged violations by November 11, 2002. When that time passed without further contact from Tapio, Verros issued a Final Request for Meeting Letter.^[14] That letter, sent on December 13, 2002, advised Tapio that the alleged violations needed to be discussed by December 20, 2002, or the MPCA would issue an Administrative Penalty Order (APO) about conditions at the feedlot.

8. No response was received to the Final Request letter.^[15] Verros inspected the feedlot again on April 16, 2003.^[16] The manure depth was consistent with the prior visits.^[17] Verros spoke to Tapio during the inspection. Tapio indicated that the Minnesota Federated Humane Societies had caused him problems in gaining access to the bison and that his machinery for clearing the manure was broken.^[18] Verros took water samples from two locations in the drainage ditch along Ebersole Avenue.^[19] One sample (Sample A) was 240 feet “upstream” of the northwest corner of feedlot.^[20] The other sample (Sample B) was taken in the ditch adjacent to the southwest corner of the Tapio feedlot.^[21] Surface water from the feedlot was visibly entering the ditch at the location where Sample B was taken.^[22]

9. The two water samples were analyzed by the Minnesota Department of Health (Health).^[23] The results of the analysis were as follows:

Substance Analyzed	Sample A	Sample B	Units
Suspended Solids	10	22	mg/L
Ph	7.8	8.1	
Total Chloride	56	190	mg/L
Total Phosphorus			
Total Ammonia	0.08	1.39	mg/L
Total Kjeldahl Nitrogen	1.50	30.6	mg/L
Total NO ₂₋₃	2.3	25	mg/L
BOD 5-day	6.1	78	mg/L
Fecal Coliform	<4	340,000	/100 ml

10. BOD 5-day stands for biochemical oxygen demand conducted over five days and is a measure of organic contaminants to surface waters.^[24] Fecal coliform is a measure of a type of bacteria present in manure-contaminated waters. Sample A is consistent with unpolluted surface waters.^[25] The fecal coliform measurement from Sample A falls in the undetectable range for the substance.^[26]

11. The Sample B measurements for total chloride, total ammonia, total Kjeldahl nitrogen, total NO₂₋₃, and BOD 5-day show some pollution entering the ditch. The fecal coliform measurement in Sample B demonstrates severe manure contamination of surface water runoff coming from the Tapio feedlot.

12. On April 17, 2003, the MPCA issued an Interim Permit to Tapio for his bison feedlot.^[27] The Interim Permit required Tapio to submit a detailed Manure Management Plan (MMP). Within ten days of the MMP being approved by the MPCA, Tapio was required to commence removal of the manure from the feedlot. The Interim Permit also required Tapio to operate the facility in a fashion to minimize adverse environmental impact, and address existing impacts.^[28] Based on discussions with Tapio, the Interim Permit included the relocation of the feedlot fence along Ebersole Avenue and the creation of a grass buffer to prevent discharges from reaching the drainage ditch. Tapio had indicated that such a relocation was feasible.

13. The cover letter for the Interim Permit noted that failure to comply with its required conditions would result in possible enforcement action. The required conditions were not met by Tapio.

14. On December 16, 2003, the MPCA issued an APO, imposing a nonforgivable penalty \$1,797.00 on Tapio for failing to comply with the terms of the Interim Permit.^[29] A schedule of corrective actions was set out in the APO. Failure to meet the schedule of corrective action triggers an additional penalty of \$5,390.00. The APO identified violations of Minn. R. 7020.2125, subpart 2(A) and Minn. R. 7060.0600, subp. 2, for failing to remove manure from a feedlot and allowing contaminated runoff to be discharged from the feedlot.^[30] The APO also identified five violations of permit conditions as a basis for the penalty. The permit conditions are failing to properly operate the facility, failing to minimize adverse impacts, failing to take interim measures to reduce impacts, failure to submit a runoff plan, and failure to submit a detailed MMP.^[31]

15. To calculate the penalty in the APO, a forum was convened, with the staffers who had been involved in the investigation participating. The potential for harm and deviation from compliance were considered for each grouping of violations. The failure to remove manure and to prevent the discharge of pollutants were rated by the forum as “moderate” on both axes of the Agency’s penalty calculation matrix (penalty matrix).^[32] Using the penalty matrix, the forum arrived at a base penalty of \$2,250, which is in the middle of the penalty range for such violations.^[33] The second grouping was Tapio’s failure to comply with the five permit provisions. For this group, the potential for harm was rated as moderate and the deviation from compliance was rated as major.^[34] Using the penalty matrix, the forum arrived at a base penalty of \$3,500, which is the lowest amount available for such violations.^[35] The base penalties are added together before applying adjustments.

16. The total base penalty of \$5,750 was adjusted by increasing the penalty by twenty-five percent for willfulness.^[36] The forum noted that Tapio was aware of the manure situation and failed to take any remedial actions since September 1999, despite numerous contacts by MPCA staff.^[37] No other adjustments were made. The penalty, after adjustment, is \$7187.50. Based on Tapio’s ongoing failure to comply, the penalty

was recommended to be nonforgivable. Based on the statutory calculation for APO penalties for feedlot violations, the adjusted penalty (\$7,187) was divided into a 75% forgivable portion (\$5390) and a 25% nonforgivable portion (\$1,797).^[38]

17. The APO set out Tapio's right to appeal the fine and conditions imposed by the MPCA.^[39] On January 2, 2004, Tapio filed a written request for review.^[40] This hearing process followed. The MPCA issued a Notice of and Order for Hearing on February 3, 2004, setting this matter on for hearing before the ALJ.

18. On March 22, 2004, MPCA staffers Greg Ruff, Gary Simonsen, and Pat Mader inspected Tapio's feedlot. Tracy Janikula, Wright County Feedlot Administrator, accompanied the MPCA staffers on that inspection. Manure and bedding were present along the western border of the feedlot reaching a depth of four feet.^[41] The MPCA staffers met with Tapio and several Wright County staffers. The MPCA concluded that another interim permit needed to be issued to Tapio, with similar conditions and abatement requirements.^[42] The Wright County staffers discussed the availability of grant money for abatement measures, as soon as the manure was removed.

19. In May 2004, Janikula drove by the Tapio feedlot. The manure and bedding piles were on the feedlot and showed no sign of being disturbed from the conditions observed on March 22, 2004.^[43]

20. Tapio has capped wells on the property.^[44] No fencing has been installed to divide the feedlot for facilitation of manure removal. Under the terms of the Interim Permit, that fencing was to have been completed in October 2003. Small quantities of manure have been packaged for sale at markets as fertilizer.^[45] The amount of manure removed from the feedlot in this fashion is miniscule.

21. At the hearing, Tapio asserted that the terrain of the feedlot cannot be radically changed without upsetting the bison. He believes the proper way to accomplish the removal of manure with bison present is to remove small portions of the accumulated manure and bedding and allow the bison to acclimatize to the changes.^[46] Tapio has not followed this practice of manure removal since 1998, which was the last time that any significant portion of the manure and bedding was removed from his feedlot.

Based on the above Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of the Pollution Control Agency have jurisdiction in this case pursuant to Minn. Stat. §§ 14.57-14.62 and 116.072.

2. All relevant substantive and procedural requirements of law and rule have been fulfilled, and the matter is properly before the Administrative Law Judge.

3. Any Finding of Fact considered more properly a Conclusion is hereby adopted as such.

4. For the purposes of this proceeding, Daniel Tapio is the owner of an animal feedlot within the meaning of Minn. Rule. 7020.0300, subps. 2 and 17.

5. Mr. Tapio violated Minn. R. 7020.2125, subpart 2(A) and Minn. R. 7060.0600, subp. 2, by failing to remove manure from his feedlot and allowing manure-contaminated runoff to be discharged from the feedlot.

6. Mr. Tapio violated conditions of his Interim Permit by failing to properly operate his feedlot, failing to minimize adverse impacts, failing to take interim measures to reduce impacts, failing to submit a runoff plan, and failing to submit a detailed manure management plan.

7. The MPCA properly calculated the penalty to be imposed on Daniel Tapio for the foregoing rule violations and permit condition noncompliance.

8. The Administrative Penalty Order issued against Daniel Tapio imposing a nonforgivable penalty of \$1,797 and a forgivable penalty of \$5390 is appropriate to the violations.

9. Tapio's continued failure to abate the conditions on the feedlot support imposing the entire fine of \$7,187 on Daniel Tapio.

Based on the above Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the Administrative Penalty Order (APO) issued against Daniel Tapio on December 16, 2003 be AFFIRMED and the \$1,797 nonforgivable penalty and the \$5390 forgivable penalty in that APO be UPHELD.

Dated this 15th day of July, 2004.

_____/s/ Richard C. Luis_____
RICHARD C. LUIS
Administrative Law Judge

Reported: Taped, Six Tapes, No Transcript Prepared.

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Agency is required to serve its final decision upon each party and the Administrative Law Judge by first-class mail.

MEMORANDUM

At the hearing, Mr. Tapio maintained that the nature of bison is incompatible with the MPCA's regulatory scheme for animal feedlots. The animal feedlot rules expressly list cattle, pigs, horses, sheep, turkeys, chickens, and ducks.^[47] The rules also expressly apply to all other animals, using a calculation of the weight of the animal to translate unlisted animals into animal units for application of the feedlot rules.^[48] The record in this matter contains no evidence that would support a conclusion that the animal feedlot rules are incompatible with bison husbandry.

MPCA staffers' lack of knowledge regarding husbandry operations is cited by Mr. Tapio as a reason to overturn the APO. He asserts that the proposed fine is more than the value of his entire bison herd. The MPCA is not concerned with running animal feedlots. The manure-contaminated discharge from Mr. Tapio's feedlot is the Agency's concern. The ongoing costs of pollution could well exceed the value of a bison herd. A relatively low value of the animals regulated does not translate into authority to disregard the prohibitions against discharging pollutants.

Tapio asserts that the MPCA did not give him adequate time to address the manure accumulation in his feedlot. This assertion relies upon the timelines in the April 17, 2003 Interim Permit for relocating the fence line away from Ebersole Avenue and establishing a grass buffer area to prevent runoff from reaching the ditch.^[49] This mitigation was to be included in a plan to abate the pollution hazard coming from the Tapio feedlot. The fence relocation was not to begin until the MPCA approved the plan. The construction was to be completed by October 10, 2003.^[50] Tapio did not submit a plan for the MPCA's approval. No construction (or the necessary removal of the existing manure) has yet begun.

On September 1, 1999, the MPCA first informed Tapio that the manure accumulations were excessive and must be removed. His reasons for not removing the manure at that time were that the bison were in their mating season and that his manure removal equipment was in need of repair.^[51] MPCA staff consulted with Tapio when arriving at the timelines for permit compliance. Numerous follow-up contacts were made by the MPCA. The APO was issued on December 16, 2003. Four years is more than enough time to have addressed the excessive manure accumulation. Six months was adequate time to comply with the Interim Permit conditions.

The bison in Tapio's feedlot were seized by the Humane Society for a period of time. Tapio asserts that he was not the owner of the bison for this period and thus he is not responsible for the manure. The same manure complained of before the seizure was in the feedlot after the seizure. The brief interim period where the bison were seized did not relieve Tapio of the responsibilities to prevent pollution from existing manure on his feedlot.

The record in this matter demonstrates that the MPCA has issued an APO that apportions the penalty into forgivable and nonforgivable segments. The statute governing APOs for feedlots provides as follows:

Subd. 13. **Feedlot administrative penalty orders.** (a) Prior to the commissioner proposing an administrative penalty order to a feedlot operator for a violation of feedlot laws or rules, the agency staff who will determine if a penalty is appropriate and who will determine the size of the penalty shall offer to meet with the feedlot operator to discuss the violation, and to allow the feedlot operator to present any information that may affect any agency decisions on the administrative penalty order.

(b) Notwithstanding subdivision 5, for feedlot law or rule violations for which an administrative penalty order is issued under this section, not less than 75 percent of the penalty must be forgiven if:

(1) the abated penalty is used for approved measures to mitigate the violation for which the administrative penalty order was issued or for environmental improvements to the farm; and

(2) the commissioner determines that the violation has been corrected or that appropriate steps are being taken to correct the action.^[52]

Mr. Tapio has not corrected the violation, nor taken appropriate steps to correct the continued discharge of pollutants from his feedlot. Under these circumstances, imposition of the entire penalty is supported. Should the Commissioner determine that the violation is subsequently corrected, or steps are taken to correct the situation, the Commissioner can deduct from the penalty the amount that Mr. Tapio uses to accomplish the correction.

R.C.L.

^[1] Exhibit 48; *see also* Exhibit 42.

^[2] Tapio Testimony.

^[3] Exhibit 42. The barn bears the notations "Lean to" and "shed" in the exhibit.

^[4] Testimony of Simonsen; *see also* Exhibit 48.

^[5] Exhibit 1.

^[6] *Id.*

^[7] Exhibit 1.

^[8] Exhibit 5.

^[9] *Id.*

^[10] Exhibits 7-9. The notation on the backs of each photograph indicates that the photographer was "DSV." Verros was the photographer; he had by then changed his first name from James to Demetrius. See Exhibit 11.

^[11] Exhibit 10.

^[12] *Id.*

^[13] Exhibit 10.

^[14] Exhibit 11.

^[15] Testimony of Simonsen.

^[16] Exhibit 12.

^[17] Exhibit 12 (attached photographs).

^[18] Exhibit 12; Testimony of Tapio.

^[19] *Id.*

^[20] Exhibit 12 (attached sketch). Flow in the ditch travels from north to south.

- [\[21\]](#) *Id.*
- [\[22\]](#) Exhibits 21, 22 and 24.
- [\[23\]](#) Exhibit 12 (attached Results Data Review).
- [\[24\]](#) Testimony of Simonsen.
- [\[25\]](#) Testimony of Simonsen.
- [\[26\]](#) *Id.*
- [\[27\]](#) Exhibit 25.
- [\[28\]](#) *Id.* at 3-4.
- [\[29\]](#) Exhibit 26.
- [\[30\]](#) *Id.*
- [\[31\]](#) Exhibit 26, at 2-3.
- [\[32\]](#) Exhibit 43; Testimony of Ruff.
- [\[33\]](#) *Id.*
- [\[34\]](#) *Id.*
- [\[35\]](#) *Id.*
- [\[36\]](#) Exhibit 43.
- [\[37\]](#) *Id.*
- [\[38\]](#) Minn. Stat. § 116.072, subd. 13.
- [\[39\]](#) Exhibit 26
- [\[40\]](#) Exhibit 27.
- [\[41\]](#) Exhibits 35-38.
- [\[42\]](#) Exhibit 34. That permit was issued on April 22, 2004. Morgan Letter, June 9, 2004.
- [\[43\]](#) Testimony of Janikula.
- [\[44\]](#) Testimony of Tapio.
- [\[45\]](#) *Id.*
- [\[46\]](#) Testimony of Tapio.
- [\[47\]](#) Minn. Rule 7020.0300, subp. 5.
- [\[48\]](#) Minn. Rule 7020.0300, subp. 5.I.
- [\[49\]](#) Exhibit 25, at 4.
- [\[50\]](#) *Id.*
- [\[51\]](#) Exhibit 1.
- [\[52\]](#) Minn. Stat. § 116.072, subd. 13.